

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

|                           |   |                            |
|---------------------------|---|----------------------------|
| <b>JIBRIL ALI SALAAM,</b> | ) |                            |
|                           | ) |                            |
| <b>Plaintiff</b>          | ) |                            |
|                           | ) |                            |
| <b>v.</b>                 | ) | <b>Civil No. 98-69-P-H</b> |
|                           | ) |                            |
| <b>NORTHEAST AIR,</b>     | ) |                            |
|                           | ) |                            |
| <b>Defendant</b>          | ) |                            |

**RECOMMENDED DECISION ON DEFENDANT’S**  
**MOTION FOR SUMMARY JUDGMENT**

Jibril Ali Salaam has sued Northeast Air pursuant to Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.*, and the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*, as a result of the company’s alleged refusal to hire him as a customer service representative on the basis of his race. Complaint (Docket No. 1) ¶¶ 1, 5, 11-17. Northeast Air moves for summary judgment. Defendant’s Motion for Summary Judgment (Docket No. 5). For the reasons that follow, I recommend that the defendant’s motion be granted.<sup>1</sup>

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<sup>1</sup>The defendant has requested a “non-testimonial” hearing on its motion using a form commonly seen in state court. Request for Hearing on Motion (Docket No. 5). To the extent this is a request for oral argument, I deny it inasmuch as I am satisfied the issue presented can be properly disposed of on the basis of the papers filed. *See* Loc. R. 7(f).

## **I. Summary Judgment Standards**

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

The Local Rules of this court require a party seeking summary judgment to provide “a separate, short and concise statement of material facts, supported by appropriate record citations, as to which the moving party contends there is no genuine issue to be tried.” Loc. R. 56. The non-movant must file a corresponding statement, “supported by appropriate record citations, as to which it is contended that there exist[s] a genuine issue to be tried.” *Id.* The rule warns that all properly supported material facts asserted in the moving party’s factual statement “will be deemed to be admitted unless properly controverted by the statement required to be served by the opposing party.” *See also Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995) (“The parties are bound by their [Local Rule

56] Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein.")

Salaam in this case grounds his statement of material facts principally on his affidavit, executed on September 25, 1998. *See generally* Plaintiff's Statement of Material Facts (Docket No. 12); Affidavit of Jibril Ali Salaam ("Salaam Aff."), appended to Plaintiff's Memorandum of Law in Support of His Objection to Defendant's Motion for Summary Judgment ("Plaintiff's Objection") (Docket No. 11). A videotape deposition of Salaam was taken on July 2, 1998. Videotape Deposition of Jibril Ali Salaam ("Salaam Dep.") at 1. In its reply brief, Northeast Air asks the court to strike Salaam's affidavit to the extent it directly contradicts his prior deposition testimony. Reply Memorandum to Plaintiff's Objection to Defendant's Motion for Summary Judgment, etc. ("Defendant's Reply") (Docket No. 14) at 6. Specifically, Northeast Air notes, Salaam avers in his affidavit that upon calling Deborah Truitt of Northeast Air to set up a job interview, he informed her that he was available only part-time and she indicated that was fine. Defendant's Reply at 2; Salaam Aff. Second ¶ 2 [sic]. At his earlier deposition, however, Salaam testified that he had not told Truitt verbally that he was available only to work part-time, but rather solely through his application. Defendant's Reply at 4-5; Salaam Dep. at 32, 36-37.

As Northeast Air correctly observes, a party may not permissibly generate an issue of material fact for summary-judgment purposes on the basis of an affidavit directly contradicting earlier sworn deposition testimony — at least not without some plausible explanation for the discrepancy. Defendant's Reply at 2; *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994). Here, no justification whatsoever is offered. Hence, I strike from the record the portion

of the affidavit at issue, the fifth and sixth sentences of the second Paragraph 2.<sup>2</sup> Inasmuch as Northeast Air points to no other discrepancies, the remainder of the affidavit will be taken into consideration to the extent cited in the plaintiff's statement of material facts.

## **II. Factual Context**

In light of the foregoing, the summary judgment record reveals the following:

Northeast Air ran identical help-wanted advertisements in the Maine Sunday Telegram on Sunday, June 15, and Sunday, June 22, 1997, seeking two customer service representatives ("CSRs") to work "at Portland Airport Facility nights and weekends." Deposition of Deborah Truitt ("Truitt Dep.") at 15-16 and Exhs. 1-2 thereto. The advertisements sought persons with the following qualifications: "Excellent customer service skills and attention to detail a must. Professional looking and flexibility needed for this exciting position." *Id.* Northeast Air placed the advertisements following its receipt of a letter of resignation from CSR Michelle Byrnes on June 6, 1997. Truitt Dep. at 41 and Exh. 7 thereto. Another CSR, Jennifer Krumm, gave notice on June 14, 1997 that she would be leaving. Truitt Dep. at 32-33 and Exh. 5 thereto. Krumm withdrew this notice on Monday, June 16, 1997; however, Northeast Air decided to continue to look for a replacement in that it appeared unlikely Krumm would remain on the job. Truitt Dep. at 32-34, 38 and Exh. 5 thereto. Krumm did in fact fail to call in or show up for work during the weekend of July 5-6, 1997. Truitt Dep. at 34, 38 and Exh. 5 thereto.

Even before the advertisements ran, Northeast Air hired Gretchen Sheehy, a walk-in job applicant, as a CSR following an interview and reference check. Truitt Dep. at 28, 30-31. On

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<sup>2</sup>These sentences are as follows: "I also told 'Deborah' that I was only available part-time, but could work nights and weekends. She indicated to me that that was fine." Salaam Aff. Second ¶ 2.

Sunday, June 15, 1997, Salaam saw the Northeast Air advertisement in the Maine Sunday Telegram. Salaam Aff. ¶ 2. There was no indication in the advertisement that the job was full-time. Exh. 1 to Truitt Dep. The following day Salaam called, made an appointment for later that day, came to Northeast Air's offices and completed an application. Salaam Dep. at 32, 37. That afternoon he was interviewed by Truitt, Northeast Air's human resource manager. Truitt Dep. at 3, 9.

Salaam was born in Senegal, West Africa. Salaam Dep. at 6. It is not obvious from speaking on the telephone with him, but is obvious in person, that he is black. Salaam Aff. ¶ 10. Salaam's appointment with Truitt was scheduled for 2:30 p.m. on Monday, June 16, 1997. *Id.* Second ¶ 2. Upon arrival at Northeast Air at approximately 2:25 p.m., Salaam was given an application to complete by an individual in the reception area, who told Salaam that Truitt would see him shortly. *Id.* ¶ 3. Truitt did not begin the interview until 3:50 p.m. *Id.* Salaam indicated on his application that he was able to work only on a part-time basis. Salaam Dep. at 36-37 and Exh. 4 thereto. The CSR position was full-time.<sup>3</sup> Truitt Dep. at 13.

The job interview was conducted in Truitt's office. Salaam Aff. ¶ 4. Salaam states that before even looking at his application or resume, Truitt immediately informed him that the job was filled. *Id.* Truitt intimates that, having learned from Salaam's application that he was interested only in part-time work, and in view of the fact that the CSR job was full-time, she asked if he were interested in ramp-agent work because that was an area in which she had greater scheduling flexibility. Truitt Dep. at 13. She explained that the ramp-assistant job entailed loading and unloading luggage on and off planes, pushing planes and driving meal carts. Salaam Aff. ¶ 4. She

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<sup>3</sup>The schedule for CSRs for the summer of 1998 reflected that they were assigned to work full-time (approximately forty hours per week). Truitt Dep. at 42-43 and Exh. 8 thereto. Night and weekend work also was required. *Id.*

said that if Salaam were interested, she could find him a job. *Id.* Salaam indicated that he was not interested in working as a ramp assistant. *Id.* ¶ 5. He reiterated that he was interested in the CSR position. *Id.* Truitt again stated that the position was filled but that she might need another CSR. *Id.* She said that she could bring Salaam back for a drug test and a police record check and then see if she could consider him for the position. *Id.* She said she would call him by the end of the week to let him know about a CSR position. *Id.* She told him that if he did not hear from her he should call the following Monday, as she sometimes got very busy and did not get back to people. *Id.*

Truitt again asked Salaam if he were sure he was not interested in labor-type work. *Id.* ¶ 6. Salaam replied that he was not. *Id.* During the course of the interview, Salaam confirmed that he was a student and would be attending school. Truitt Dep. at 16-17. He informed Truitt that he was in his fourth year of college as a science major and had a computer background. Salaam Aff. ¶ 6. The interview ended at 3:57 p.m. *Id.* During the interview, Truitt was very brusque and bordering on rude, telling Salaam there was no CSR position available but that he could have a job as ramp attendant. *Id.* ¶ 11.

Having not heard from Truitt by the end of the workweek, Salaam called on Monday, June 23, 1997, and left a message regarding the CSR position on her voice mail. *Id.* ¶ 7. He never heard back from her. *Id.* On Sunday, June 22, 1997, Salaam noticed that Northeast Air was running the same advertisement for CSRs. *Id.* ¶ 8.

Northeast Air hired Maureen Snyder as a CSR after she interviewed on June 25, 1997. Truitt Dep. at 34-35. On Monday, June 30, 1997, Salaam asked a friend, Eric Driscoll, to call about the CSR position to find out if it was still open. Salaam Aff. ¶ 9. That day Driscoll called Northeast Air at 774-6318 and spoke to a person who identified herself as “Deborah.” Affidavit of Eric Driscoll,

appended to Plaintiff's Objection, ¶ 2. He asked if the CSR position advertised in the Maine Sunday Telegram on Sunday, June 22, 1997, was still open. *Id.* "Deborah" indicated to Driscoll that the position had been filled on June 27, 1997. *Id.*

Salaam explained at his deposition that the reason he brought this claim was the inconsistency he perceived between being advised at his June 16, 1997 interview that the CSR position had been filled and later seeing the same advertisement for the CSR opening run in the newspaper. Salaam Dep. at 28-29. Salaam acknowledged that he would not have been eligible for the CSR position because it was full-time and he was applying for part-time work. *Id.* at 77.

Salaam ultimately was hired to work at Peoples Bank commencing July 14, 1997. *Id.* at 39-40. While there he worked a part-time schedule, ranging from fourteen and a half to twenty-two and three-quarters hours per week. *Id.*

Salaam states that, at the time he applied for the Northeast Air CSR position, he was qualified to perform it. Salaam Aff. ¶ 12 and resume attached thereto. In April 1998 Northeast Air extended an offer of a CSR position to Salaam, coinciding with his projected college graduation and his availability for full-time work. Salaam Dep. at 46 and Exh. 8 thereto. Salaam declined in that he was expecting another offer of employment. Salaam Dep. at 46.

As of the time of Truitt's deposition in July 1998, she had worked for Northeast Air as the human resource manager involved in hiring for a little more than a year and a half. Truitt Dep. at 3. One black individual was working as a CSR for Northeast Air at the time she commenced employment but left in late 1997. *Id.* at 25-27. Two other black individuals were employed by Northeast Air as of June 1997, both as fuelers. *Id.* at 26-27. Drug testing and police record checks are required only for individuals holding ramp-agent and aircraft-maintenance positions. *Id.* at 5-6.

### III. Discussion

Salaam in this case presents no direct evidence that Northeast Air discriminated against him on the basis of his race. As the parties agree, the so-called *McDonnell Douglas* burden-shifting analysis accordingly applies.<sup>4</sup> Memorandum of Law in Support of Defendant’s Motion for Summary Judgment (“Defendant’s Memorandum”) (Docket No. 5) at 5; Plaintiff’s Objection at 5; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

Under the *McDonnell Douglas* rubric, a plaintiff must first establish a *prima facie* case of discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). This raises a presumption that the defendant did unlawfully discriminate, which the defendant may rebut by adducing evidence that its actions were taken for legitimate, nondiscriminatory reasons. *Id.* at 506-07. When rebutted, the presumption of discrimination falls away. *Id.* at 507. This notwithstanding, the plaintiff ultimately must persuade a trier of fact, by a preponderance of the evidence, not only that the proffered reasons were pretextual but also that the real reasons were impermissible (*e.g.*, motivated by racial animus). *Id.* at 507-08. Rejection of an employer's reasons as pretextual permits, but does not compel, a finding that the employer was in fact motivated by impermissible animus. *Id.* at 511.

In the job-hunting context, a plaintiff establishes a *prima facie* case of discrimination by showing: that he or she (i) is a member of a protected class, (ii) applied for a job for which he or she was qualified, and (iii) was rejected, but the position remained open to other candidates with comparable credentials. *Sinai v. New England Tel. & Tel. Co.*, 3 F.3d 471, 474 (1st Cir. 1993).

The First Circuit has observed that the burden of establishing a *prima facie* discrimination

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<sup>4</sup>The same analysis applies to both the Title VII and Maine Human Rights Act claims. *See, e.g., Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 436 n.3 (1st Cir. 1997).



case is not particularly onerous. *See, e.g., Brennan v. GTE Govt'l Sys. Corp.*, 150 F.3d 21, 26 (1st Cir. 1998). Northeast Air nonetheless argues that Salaam falters at this starting gate. Defendant's Memorandum at 5-6. Salaam, it contends, was not qualified for the full-time job of CSR in that at the time he applied he was available to work only part-time. *Id.* at 6. The parties do not cite, nor does my research reveal, controlling caselaw in a Title VII context as to whether an employee's availability factors into his or her "qualifications" for a job. The First Circuit has, however, noted in a disability-discrimination case that to demonstrate her qualification for a hospital job, a nurse who was unable to rotate shifts would have to adduce evidence that shift rotation was not an essential function of the job.<sup>5</sup> *Laurin v. Providence Hosp.*, 150 F.3d 52, 59 n.5 (1st Cir. 1998). A person's availability to perform a job, moreover, is often as decisive of whether an applicant is employable as are that person's credentials.

It is undisputed that Salaam was unavailable to work full-time when applying for the CSR job on June 16, 1997 and that the CSR job was full-time. Salaam therefore fails to demonstrate that he was qualified for the job. If a plaintiff cannot sustain his or her burden of making out a *prima facie* case in a Title VII action, summary judgment in favor of the defendant is warranted.<sup>6</sup> *See, e.g., Thomas v. Digital Equip. Corp.*, 880 F.2d 1486, 1489-90 (1st Cir. 1989).

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<sup>5</sup>The *Laurin* case arose under the Americans with Disabilities Act (the "ADA"); however, the First Circuit has noted similarities in the interpretation of the ADA and Title VII. *See, e.g., Dichner v. Liberty Travel*, 141 F.3d 24, 29-30 n.5 (1st Cir. 1998).

<sup>6</sup>Salaam makes no argument to the contrary, although the summary-judgment record in this case does contain some evidence from which discrimination could be inferred. Instead, Salaam rests his objection to summary judgment on the asserted existence of a genuine issue of material fact as to whether he was told his part-time availability was acceptable to Northeast Air. Plaintiff's Objection at 5-6. As discussed above, I have stricken from the record the evidence upon which Salaam relies for this proposition.

#### IV. Conclusion

For the foregoing reasons, I recommend that Northeast Air's summary judgment motion be **GRANTED**.

#### NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 2nd day of November, 1998.*

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*David M. Cohen  
United States Magistrate Judge*